

January 10, 2005

Regulatory Branch

See Distribution

Thank you again for attending and participating in our December 8, 2004 State Program General Permit (SPGP) stakeholders' meeting.

Attached are the comments made at the meeting along with our responses. This letter and your issues and our responses have been posted on our web site at <http://www.nao.usace.army.mil/Regulatory/Regulatory.html>. As a reminder, the public comment period for submitting any additional comments on the SPGP Second Annual Report ends on January 18, 2005.

We will fully consider all of your comments and those received from the public as we develop proposed changes to the SPGP. These proposed changes will be advertised by public notice and posted on our web to provide you, government agencies, and the public with an opportunity to comment.

If you have any questions, you may call Bruce Williams of my staff at 757.441.7418 or email him at [bruce.f.williams@usace.army.mil](mailto:bruce.f.williams@usace.army.mil).

Sincerely,

-S-

J. Robert Hume, III  
Chief, Regulatory Branch

Enclosure

Distribution List:

Shawn Everett, Bay Environmental  
Pat O'Hare, Reed Smith  
Chuck Ferguson, James River Association  
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Comments from the Second Annual SPGP Stakeholders' Meeting on December 8, 2004

1. What specific language do EPA and the Fish and Wildlife Service need to include in their comment letter to “kickout” a project from the SPGP and require an individual permit?

Corps' Response: We recommend that the federal resource agencies incorporate the following language into their letters when they believe a permit application should require an individual permit:

Based on our review of the extent of the project and/or the adequacy of the mitigation plan (select one or both and outline the specific concerns), we believe the proposed impacts are more than minimal individually and cumulatively. Therefore, we recommend this project be reviewed under an individual permit.

2. Concern was expressed that the Corps staff was using the Virginia Aquatic Resources Trust Fund rather than exploring on-site or off-site opportunities. What are the “rules” for outside interests to apply for use of Trust Fund Monies?

Corps' Response: Pages 10 and 11 of the Corps' second annual report on the SPGP outlines that over 79% of the Category C projects required either on-site mitigation, off-site mitigation, or the purchase of mitigation bank credits. Only the remaining projects involved use of the Virginia Aquatic Resources Trust Fund. It is the District's practice to use the Fund when other mitigation options are not practicable.

Often entities not party to the Trust Fund agreement become aware of streams that they believe should be preserved or restored, but lack the funds to accomplish such projects. In these cases, outside parties may propose stream mitigation projects to the Fund for consideration by or to partner with the Fund. Attached is the process to seek the use of those funds.

3. Concern was expressed that the terms “stream restoration”, “stream enhancement”, and “stream preservation” are used to describe mitigation, but have not been defined.

Corps' Response: We concur that these terms are often used, but have not been clearly defined. We are working with DEQ to develop definitions for each term.

4. Concern was expressed that the Corps was not providing all pertinent information (especially avoidance and minimization measures) to the federal resource

agencies when coordinating SPGP category C projects. On a related issue, the federal resource agencies did not consider 15 calendar days to be a sufficient comment period since many times they don't receive the coordination package for 5-7 days. They requested they be provided additional time to review these projects.

Corps' Response: In the SPGP, the applicant is required to submit multiple copies of the Joint Permit Application and the drawings. These extra copies are used in the coordination packages provided to the federal resource agencies. Most of the time, the avoidance and minimization analysis is contained in the Joint Permit Application. However, if it is a supplemental package, we have instructed our staff to provide this to the federal resource agencies. With respect to the comment period, we will express mail these coordination packages in the future so that they are promptly received negating the need to extend the comment period beyond 15 days.

5. A question was raised on what the Corps needed to review plans and costs associated with the use of the Virginia Aquatic Resources Trust Fund.

Corps' Response: The Corps project manager completes a form based on information gleaned from the application and the drawings. The project manager provides it to our Trust Fund Administrator who uses the data to develop a contribution estimate.

6. An attendee requested a copy of our responses to the issues raised at the last SPGP stakeholders' meeting.

Corps' Response: The responses to the comments made at the first annual SPGP stakeholders' meeting is posted on our web site. These responses were distributed to all attendees by email on December 15, 2004.

7. One commenter mentioned that the Corps is not consistently using the "tear-off" jurisdictional confirmation pre-printed form.

Corps' Response: It is the District's policy to use the "tear-off" delineation confirmation at the consultant's request and when the delineation is correct as submitted or with only very minor changes. These changes are depicted on the delineation and referenced on the "tear-off" sheet delineation confirmation.

8. An attendee expressed support for the Corps' involvement in the preapplication process, but expressed concern that we may inadvertently imply to a property owner that he/she has a permit based on our comments and that we may be circumventing the public review process.

Corps' Response: When we meet with project proponents in the preapplication process, we provide them with our comments and recommendations on how the

project should be modified. However, we stress that no final decision can be made on whether a permit will be issued until we receive a permit application and conduct the required review. We are taking the initiative to meet with localities at the staff level to provide our comments during their project review process. Our comments will be forwarded to the project proponent and to DEQ.

9. It was recommended that in future reports processing time be included. Information was also requested that on the number of SPGP Category A and B projects involving either a federally listed threatened or endangered species or listed or eligible historic property.

Corps' Response: In the third annual report, we will include the process time for Category C projects. We have reviewed the Category A and B projects and 20% of them resulted in an endangered species or a historic properties "hit" requiring us to initiate consultation with either the Fish and Wildlife Service or the Virginia Department of Historic Resources.

10. One attendee urged the Corps to take advantage of the SPGP and devote more effort to protecting wetlands through enforcement.

Corps' Response: As we have indicated in the annual report, we have devoted more time to enforcement and compliance. The 168 SPGP Category A and B projects only accounted for 3% of our permit actions. However, since Fiscal Year 2002, we have increased site visits to investigate unauthorized activities and permit compliance by 32% and 45% respectively. As mentioned at the meeting, we are in the process of reviewing these missions and preparing a detailed holistic plan for further improving our efforts.

11. One attendee mentioned that the goal of "one stop shopping" had not been achieved. Feedback from his members of the Home Builders Association of Virginia indicate that the Corps was still reviewing SPGP Category A and B projects beyond just endangered species and historic properties. The attendee suggested that DEQ perform the database checks for SPGP Category A and B projects. The commenter also requested data on how many Category A and B projects had database "hits". Another commenter indicated that there were some inconsistencies among Corps Office on how SPGP Category A and B projects were handled.

Corps' Response: While this was discussed at some length, no specifics were provided. Hence, we cannot determine whether or not this is a problem or to what degree. However, we have instructed our staff that they are only to conduct database checks on Category A and B projects since DEQ is responsible for the avoidance and minimization review and determining the type and extent of compensatory mitigation. The attendee who mentioned this issue was asked to advise his members to contact the District management if there were any future instances of a Corps project manager allegedly conducting the review beyond the

database check. The only exception to this level of Corps review is when an application is part of a phased development and involves work that cumulatively causes the total project impacts to exceed 1 acre and therefore require an individual permit. Based on Fiscal Year 2004 data, 20% of the Category A and B projects required consultation for either federally listed threatened or endangered species or historic properties.

As to DEQ performing the database checks, for projects with database “hits”, DEQ will have to advise the Corps of the results of the database searches and the Corps will have to initiate the required consultation. This creates greater opportunities for miscommunication and oversight.

12. One attendee urged better coordination on Category C projects to ensure the required mitigation was consistent.

Corps’ Response: We work closely with DEQ to make sure we don’t place the applicant in a position where he/she has to deal with multiple mitigation requirements. If problems cannot be resolved at the project manager level, they are brought to the attention of each agency’s management for resolution. We will continue to work with DEQ on this issue.

13. One attendee urged that the lateral encroachments for transportation projects be allowed under the SPGP and that the impact limit for transportation projects should be 1 acre to be consistent with development projects.

Corps’ Response: We have developed draft language to address the lateral encroachment issue. As to the request for a 1 acre limit on linear transportation project, we will consider it as we develop revisions to the SPGP.

14. One attendee suggest that the SPGP Category C impact limit for streams be reduced to 500 linear feet since the annual report indicated that was the average impact. They also requested the same impact information (requested and authorized impacts and required mitigation) be provided on individual permits as was outlined for SPGP Category C projects.

Corps’ Response: Mathematically, the average stream impact is about 500 linear feet per project. However, reducing the impact limit from 2,000 linear feet to 500 linear feet does not necessarily mean that the impacts for all projects will be reduced to that amount through the individual permit process. The information requested on individual permits will be included in future annual reports.

15. One attendee expressed concern over the extent of mitigation required for streams.

Corps’ Response: We presently lack a methodology to assess stream functions or determine the required mitigation in a simple or predictable manner. However,

the case can be made that we are actually under-mitigating for stream impacts, especially with the extent of preservation as part of the mitigation plans. A revised draft version of the stream attributes assessment form will be field tested by representatives of the Corps, DEQ and the consultant community in early 2005 to seek input on its utility to assess both impacts and the required mitigation.